United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7185

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7185

CINEMA 5, LTD.,

Plaintiff-Appellant,

—against—

CINERAMA, INC., NATIONWIDE THEATRES CORP., CONSOLIDATED AMUSEMENT CO., LTD., PACIFIC THEATRES CORPORATION, ATLANTIC THEATRES CORP. OF CALIFORNIA, RKO-STANLEY WARNER THEATRES, INC., WILLIAM R. FORMAN, MICHAEL R. FORMAN and JAMES J. COTTER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF OF PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

This Brief is in reply to the Brief filed for defendants-appellees. Defendants either ignore or warp the facts in this case and ignore the objective standard set down by this Court in disqualification matters.

FACTS

At page 1 of their Brief, defendants give lip service to the fact that the Buffalo firm represents Cinerama in the Western District cases. From then on, however, defendants proceed as if Mr. Fleischmann represents Cinerama in the Western District cases as a single practitioner and his firm in New York, Webster Sheffield, represents Cinema 5 in this action. As found by the court below, the Buffalo firm represents Cinerama, it has no relationship to Webster Sheffield except that one attorney is a partner in both firms, and Mr. Fleischmann ceased any role in the defense of the Western District cases over three years ago (118a).

At page 5 of their Brief, defendants argue that "Cinerama's worldwide activities in the motion picture industry" form a basis of the allegations in this complaint. To support this statement, they cite paragraph 38(iii) of the complaint. This is a complete non-sequitur. As is clear from paragraph 38(iii), it is "Forman's enormous leverage and buying power in the motion picture industry as a whole," not "defendants" or Cinerama which is the basis of those allegations.

Just as Forman was the moving force behind the petition for the stockholders' list, he is the moving force in the take-over of Cinema 5 through a maze of corporations he owns and controls. Cinerama is involved through its ownership of RKO and its first-run Manhattan theatres and Forman's desire to achieve a dominant position in the Manhattan first-run theatre market. Defendants seek to impose on Cinerama and the Western District cases geographic impact beyond Buffalo and Rochester that does not exist.

This case has nothing to do with the Western District cases and defendants are not able to point to one single fact which contradicts this. Thus, defendants claim at page 7 of their Brief that "the inner workings of Cinerama are likely to be the same in Rochester and Buffalo as in Manhattan." (Emphasis supplied). Also, at page 7, defendants claim that "material relevant to the defense of Cinerama in the Western District litigation may have a bearing on this action." (Emphasis supplied). The use of the conditional tense is significant, as no evidence was offered below to support these allegations, nor is there any. The first Western District case was filed in late 1971. Presumably, in the almost four years since then, if there were any material there which might

have a bearing on this case, defendants would have certainly provided it in the record below. Just as the defendant in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, Docket No. 74-1104 (2d Cir. May 23, 1975) (slip ol 3669), defendants here "chose to approach the matter in largely conclusory [conditional] terms." slip op. 3680. The plain fact is that the cases are totally unrelated.

At pages 7-9 of their Brief, defendants argue that the derivative suit and stockholders' list proceeding brought by Consolidated are irrelevant to this motion. When the derivative action was filed on October 4, 1974, the Designation Form filed by defendants' attorneys listed this case under "Pending Related Cases, If Any." At that time, obviously, defendants' counsel saw a relationship between the derivative action and this one as part of the overall fight for control of Cinema 5 and that is how both came to be assigned to Judge Brieant. Subsequently, the specific issues in this case were raised in the answers of the defendants. In an affidavit filed in the court below, defendants' attorney stated that the derivative action had been "consolidated" with this case (139a). It is difficult to understand how defendants can now argue that the litigation commenced by them is unrelated to this case. They are all part of Forman's attempt to take over Cinema 5.

ARGUMENT

In substance, defendants argue in their Brief that the Western District cases and this case are substantially related because they both involve the motion picture industry and the antitrust laws. There is no painstaking analysis of the facts and law as this Court requires, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation, supra at 3672.

For example, the defendants at page 2 of their Brief, argue that the nexus of the cases is that each requires "extensive, specialized knowledge on the part of counsel concerning the booking and distribution of motion pictures..." Plaintiff showed at pages 26-29 of its Brief that nothing in the record supports such a statement and it is clearly erroneous. Yet, defendants totally ignore this issue, and made no attempt to show how this nexus actually exists. The reason for this omission, plaintiff contends, is because such a nexus simply does not exist as shown in plaintiff's Brief.

At pages 9-15 of their Brief, defendants merely quote from various cases without any analysis of the facts in those cases and the facts here.

On the other hand this Court in Silver Chrysler found that these very cases show that disqualification was ordered only where the substantial relationship between the representations was "patently clear." This Court also stated that those cases furnished "no applicable guide as to what creates a substantial relationship." (slip op. 3675)

Furthermore, defendants attempt to brush off the SEC allegations of this complaint as technical violations (page 4 of defendants' Brief). Allegations of willful misrepresentations and willful failures to disclose are hardly "technical in nature."

The plain and simple fact is that there is no conflict, apparent or real, in this case. This is conclusively established by the actions of defendants themselves. While defendants argue that Cinerama does not consent to Webster Sheffield's continued representation of plaintiff in this case because of alleged conflicts and inhibitions in the Western District cases (at page 15), they have consented to Webster Sheffield's presence in a derivative action and in the stockholders' list proceeding, both of which cases involve exactly the same issues as this case. The same witnesses will be

deposed and cross-examined by Webster Sheffield in those cases as in this one on exactly the same facts and issues.* It would seem that Cinerama would be just as inhibited in the Western District cases if Webster Sheffield remains in the derivative action and stockholders' list proceeding. Failure of defendants to move for disqualification in the other cases is conclusive proof that there is no conflict and there would be no such inhibition, especially since defendants have been unable to point to any conflicts or inhibitions even though the first Western District case was filed in December, 1971.

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* Forman controls Cinerama and, as conceded by defendants, he owns Consolidated. Defendant's Brief, p.8. Moreover, the New York Supreme Court has found that Forman is the prime mover in the stockholders' list proceeding. (135a) Forman is more than a mere stockholder of Cinerama as indicated by defendants in their brief. Defendants' Brief p.8. Forman is President and chief executive officer of Cinerama and owns over $3,000,000 of its shares through his ownership of Pacific Theaters Corporation which, in turn, owns Nationwide Theaters Corp. In addition, all of these corporations have common officers and directors. Forman is President of Cinerama, Pacific and Nationwide. His son is President of Consolidated, Vice President-Secretary of Cinerama and Vice President of Pacific and Nationwide. They are both directors of Cinerama, Pacific, Nationwide and Consolidated. (See paragraphs 4 through 12 of the Verified Complaint herein at 6a-9a).

At pages 15-16 of their Brief, defendants argue that their failure to show any breach of confidential information is irrelevant as a matter of law. This argument simply ignores this Court's holding in Silver Chrysler. There, the substantially related test was applied to two aspects of the representations in issue. The first inquiry was whether or not the issues in the litigations were substantially related. Upon finding that there was no substantial relationship, the Court then applied the substantially related test to the relationship the attorney whose disqualification was sought had with the parties. Since the attorney may have obtained confidential information through that relationship the Court inquired into whether information substantially related to the case at issue had been disclosed during the prior representation. Since there had been no such disclosure, disqualification was not required on that count either.

> "To apply the remedy [of disqualification] when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions [ordering disqualification]" Silver Chrysler, supra at 3680.

Since the fact that Mr. Fleischmann is a partner in both firms could conceivably give rise to the same kind of problem as existed in Silver Chrysler, plaintiff's

Brief carefully analyzed the nature of that relationship and showed that there had been no disclosure of confidential information and that there would be none in the future, let alone any information substantially related to this case. As in Silver Chrysler, there should be no disqualification here.

It is clear from the record that there has been no disclosure of confidential information to the Buffalo firm which is in any way related to this case. First, the defendants were unable to point to any; second, the Judge has found that there has been no impropriety and that there would be none (156-157a). Defendants' reference to a letter by Mr. Fleischmann at page 6 of their Brief is again misleading since this letter was never answered and Cinerama's California counsel drafted all the legal papers which were filed in the Western District cases, including the answers, answers to interrogatories and request to admit. The Buffalo firm was directed to maintain a low profile and do as little as possible. (See Plaintiff's Brief, pages 12-15).

It is clear that there would be no confidential disclosure in the future since the Buffalo firm represents

a competitor of Cinerama in those actions and the defendants are quite willing to have Webster Sheffield probe into the same facts and issues in discovery in the derivative action and the hearing in the stockholders' list proceeding* as they would probe into this action.

Finally, defendants simply ignore the right of Cinema 5 to have counsel of its own choice, especially counsel which has represented Cinema 5 since 1958. "Plaintiff's retainer of Webster Sheffield" (see page 7 of defendants' Brief), long antedated Cinerama's retaining the Buffalo firm. The whole purpose of the substantial relationship test as set forth in Silver Chrysler was to strike the delicate balance between client's right freely to choose counsel and the highest standards of professional ethics. Defendants simply ignore this balance as they ignore the facts here and the holding of Silver Chrysler. Instead, they seek to use high-sounding phrases

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* Defendants correctly point out that the hearing before the referee in the stockholders' list proceeding is set for November, 1975; but they fail to mention that it previously had been scheduled for June 26, 1975 at their instance and subsequently postponed by them when Forman could not attend.

such as the "appearance of impropriety" to achieve a completely unfair and unjust result. Realistic analysis of the representations in issue here shows that there is no substantial relationship between them - nor is there any appearance of impropriety, which can only arise where there is such a substantial relationship. The decision below was obviously based on a misapprehension of the general language in the prior cases (see Plaintiff's Brief, pages 38-42) and was made before Silver Chrysler was decided.

CONCLUSION

For the reasons stated above and in plaintiff's Brief, the order of the Court below to disqualify plaintiff's counsel should be reversed.

Respectfully submitted,

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Service of two (2) copies of
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